2014 WL 1921222 (Iowa Dist.) (Trial Motion, Memorandum and Affidavit)
District Court of Iowa.
Scott County

Zachary WILLIAMS, Plaintiff,
v.
CAT SCALE CO., INC., Defendant.

No. LACV121926.
February 19, 2014.

Defendant's Motion for Directed Verdict

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Defendant CAT Scale Co., Inc. by its attorneys, Diane M. Reinsch and Kelsey A. W. Marquard of Lane & Waterman LLP, moves the court for directed verdict on Plaintiff's claims and in support thereof states as follows:

"Where no substantial evidence exists to support each element of a plaintiff's claim, the court may sustain a motion for directed verdict. Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion." *Cawthom v. Catholic Health Initiatives Iowa Corp.*, 743 N.W.2d 525, 528 (Iowa 2007) (citations omitted). The evidence is viewed in the light most favorable to the party against whom the motion was directed. *Id.*

To prevail on an intentional tort claim of wrongful discharge from employment in violation of public policy, an at-will employee must establish the following elements: (1) the existence of a clearly defined and well-recognized public policy that protects the employee's activity; (2) this public policy would be undermined by the employee's discharge from employment; (3) the employee engaged in the protected activity, and this conduct was the reason the employer discharged the employee; and (4) the employer had no overriding business justification for the discharge. *Lloyd v. Drake Univ.*, 686 N.W.2d 225, 228 (Iowa 2004); *Davis v. Horton*, 661 N.W.2d 533, 535-36 (Iowa 2003). Plaintiff has not submitted substantial evidence to prevail on all elements of his claim and CAT Scale is entitled to a directed verdict as a matter of law.

A. A Plaintiff Abandoning his Rights Under the Workers' Compensation Statute and Seeking Unauthorized Medical Care does not have a Clearly Defined Public Policy and Well Established Basis in Public Policy

Plaintiff is unable to establish the first element of his claim, because the abandonment of his workers' compensation statutory rights to seek unauthorized medical care is not a clearly defined public policy. Iowa law recognizes a "public-policy exception to the at-will employment doctrine[,]" which "limits an employer's discretion to discharge an at-will employee when the discharge would undermine a clearly defined and well-recognized public policy of the state." *Berry v. Liberty Holdings, Inc.*, 803 N.W.2d 106, 109 (Iowa 2011) (citing *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 763 (Iowa 2009). Under this "public-policy exception," an employee can bring "an intentional tort claim of wrongful discharge from employment in violation of public policy" against his or her employer if the employer terminated the employee for engaging in certain categories of "protected activity." *Id.* at 109-10.

Plaintiff contends the law set forth in *Bell Bros. Heating & Air Conditioning v. Gwinn*, 779 N.W.2d 193 (Iowa 2010) supports his position that Plaintiff's pursuit of unauthorized medical care at his own expense is an activity protected by the public policy of the state of Iowa. The Iowa Supreme Court has identified three sources in which a well-defined public policy might be embodied - Iowa's legislatively enacted statutes, Iowa's Constitution, or Iowa's administrative regulations. *Id.* at 63-74. Defendant found no reported case recognizing judicial pronouncements as a proper source of public policy. *See Tuttle v. Keystone Nursing Care Center, Inc.*, 2009 WL 779538, *9 (Iowa App.) (unpublished) (stating that a statement in a U.S. Supreme Court case that there is a public policy interest in protecting the **elderly** from **abuse** is not a recognized source of public policy under Iowa law). The Iowa Supreme Court has made amply clear that the public-policy exception is a narrow exception to the general rule of at-will employment. *Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 560 (Iowa 1988). The court should not expand the source for public policy exceptions beyond those enumerated by the Iowa Supreme Court. Since case law has never been identified as a source of public policy, CAT Scale is entitled to a directed verdict as a matter of law on this element of Plaintiff's claim for wrongful discharge.

B. Plaintiff has Failed to Submit Substantial Evidence on Whether or Not Public Policy would be Undermined by his Discharge.

For the reasons set forth in section A above, Plaintiff also is unable to meet his burden on the second element of his claim. Furthermore, according to *Bell Bros.* upon which Plaintiff relies for his source of public policy, when an injury is accepted as compensable, which was the evidence in this case at bar, an employee may select his own medical care "when the employee abandons the protections of section 85.27 or otherwise obtains his or her own medical care independent of the statutory scheme." 779 N.W.2d at 204. If the Plaintiff has abandoned his statutory rights, then no public policy is undermined.

C. Plaintiff has Failed to Submit Substantial Evidence on whether CAT Scale Had an Overriding Business Justification for the Discharge.

Plaintiff has failed to provide any evidence as to whether or not CAT Scale had an overriding business justification for terminating Plaintiff's employment. While Plaintiff questioned Mr. Jurgersen regarding CAT Scale's reasons for his termination, there is no evidence on the issue of whether CAT Scale had no overriding business justification for the discharge and as such Plaintiff has failed to put forth sufficient evidence to meet his burden on this element and a directed verdict is appropriate as a matter of law on Plaintiff's claim.

D. Punitive Damages should not be Submitted to the Jury to the Extent the Court Determines *Bell Bros.* sets forth a Clearly Defined Public Policy Permitting Employees to Seek Unauthorized Medical Care at their own Expense because it is a newly Recognized Protected Activity

The Supreme Court in *Bell Bros.* addressed the issue of the burden of proof required by an employee to establish a claim for benefits and expenses on account of medical care obtained by the employee, but not authorized by the employer or the Industrial Commissioner. *Bell Bros.*, 779 N.W.2d at 203-04. *Bell Bros.* is not a retaliatory discharge case. Iowa has refused to permit punitive damages in an action for retaliatory discharge when the grounds for the discharge have been recognized for the first time to be in violation of public policy. *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 773-74 (Iowa 2009) (*citing Lara v. Thomas*, 512 N.W.2d 777, 782 (Iowa 1994)). The rationale behind this rule is an employer cannot willfully and wantonly disregard rights of an employee derived from some specific public policy when the public policy has not first been declared by the legislature or our courts to limit the discretion of the employer to discharge an employee at the time of the discharge. *Jasper*, 764 N.W.2d 751, 773-76 (*citing Smith v. Smithway Motor Xpress*, 464 N.W.2d 682 (Iowa 1990) (holding punitive damages not available because at the time of plaintiff's discharge Iowa had not yet adopted the public policy exception to the employment at will doctrine)).

While the Iowa Supreme Court has recognized the Iowa Workers' Compensation Act is a source of public policy, its interpretation in *Bell Bros.*, that an employee can abandon his or her statutory rights and then later seek compensation under the Workers Compensation Act, is not an interpretation of the statute that a reasonable employer would easily discern from a review of the statute. *Bell Bros.*, 779 N.W.2d at 204. Therefore, it is clearly contrary to the holdings in the court's opinions providing that an employer cannot willfully and wantonly disregard rights of an employee when the public policy has not been declared. *Id.*

E. There is Insufficient Evidence to Submit the Issue of Punitive Damages to the Jury

To recover punitive damages, Plaintiff must demonstrate "by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." Iowa Code § 668A. 1. The Iowa Supreme Court has explained conduct is "willful and wanton" when:

> "[t]he actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences."

Miranda v. Said, 836 N.W.2d 8, 34 (Iowa 2013) (citing *Wilson v. Vanden Berg*, 687 N.W.2d 575, 586 (Iowa 2004) (quoting *McClure v. Walgreen Co.*, 613 N.W.2d 225, 230 (Iowa 2000)). Stated differently:

> The acts must manifest a heedless disregard for or indifference to the rights of others in the face of apparent danger or be so obvious the operator should be cognizant of it, especially when the consequences of such actions are such that an injury is a probability rather than a possibility. Recklessness may include willfulness or wantonness, but if the conduct is more than negligence it may be reckless without being willful and wanton. We have required evidence of a persistent course of conduct to show no care with disregard of consequences. If it were not so required, we would be allowing an inference of recklessness from every negligent act.

Id. (citing *Vipond v. Jergensen*, 260 Iowa 646, 650, 148 N.W.2d 598, 600-01 (1967)) (emphasis added). The Iowa Supreme Court in *Cawthorn* defined the legal malice standard as follows:
"[L]egal malice may be shown by wrongful conduct committed with a willful or reckless disregard for the rights of another." ... "Thus, merely objectionable conduct is insufficient.... To receive punitive damages, plaintiff must offer evidence of defendant's persistent course of conduct to show that the defendant acted with no care and with disregard to the consequences of those acts."

Cawthorn, *143* N.W.3d at 529 (citing *Wolf v. Wolf*, 690 N.W.2d 887, 893 (Iowa 2005) (quoting *Jones v. Lake Park Care Ctr., Inc.*, 569 N.W.2d 369, 378 (Iowa 1997), and *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co.*, 510 N.W.2d 153, 156 (Iowa 1993)) (citation omitted) (emphasis added). Punitive damages serve as a form of punishment, and as such, mere negligent conduct is not sufficient to support a claim for punitive damages." *Id.* (citing *McClure v. Walgreen Co.*, 613 N.W.2d 225, 230 (Iowa 2000)).

A reasonable jury cannot conclude that CAT Scale acted with legal malice in terminating Plaintiff's employment. Plaintiff's claim for punitive damages rests on the contention that House Counsel Mike Kuperman drafted the termination letter that listed an additional factor for Plaintiff's termination Plaintiff's violation of company policy by his decision to modify his care without prior authorization from the company insurance carrier for a change in surgeon and facility. Plaintiff contends that CAT Scale knew or should have known that in March 2010 the Iowa Supreme Court issued its opinion in *Bell Bros. Heating and Air Conditioning v. Gwinn*, 779 N.W.2d 193, 204 (Iowa 2010) which recognized that an employee may abandon his workers' compensation rights and seek unauthorized medical care at his own expense. Plaintiff further contends that a reasonable employer reading this case in conjunction with *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682 (Iowa 1990) (holding

even though the discharge did not directly interfere with payment of benefits, the firing violated public policy because it would chill the assertion of workers' compensation rights) should have known that it was against the public policy of the State of Iowa to terminate an employee who abandons his statutory worker's compensation rights and decides to pay for his own medical treatment.

Plaintiff seeks to hold CAT Scale to an objective standard of reasonableness, which is a negligence standard. *See Campbell v. Van Roekel*, 347 N.W.2d 406, 412 (Iowa, 1984) (dissenting opinion) (stating negligence is an objective standard based on reasonableness). “Negligence” means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. “Negligence” is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances. Iowa Civil Jury Instruction 700.2 Ordinary Care - Common Law Negligence - Defined. The fact that a reasonable person in Mr. Kuperman's shoes would have done research or further investigated the state of the law is negligence at most; not willful and wanton conduct. Mere negligent conduct is not sufficient to support a claim for punitive damages. *Cawthorn*, 743 N.W.2d 529 (citing *McClure v. Walgreen Co.*, 613 N.W.2d 225, 230 (Iowa 2000)).

Rather, Plaintiff must produce clear, convincing and satisfactory evidence that CAT Scale engaged in a persistent course of conduct to show that it acted with no care and with disregard to the consequences of those acts. *Id.* (affirming a denial of the submission of punitive damages where hospital was aware of one complaint against physician, but an internal peer review committee did not identify any practice problems regarding infection; the cause of the plaintiff's injuries) (internal citations omitted). In other words, there was no evidence of a persistent course of conduct to show that the hospital acted with disregard to the consequences of those acts so punitive damages were properly denied.

Similarly, in *McClure* concerning prescription errors, the court allowed the issue of punitive damages to go to the jury because the evidence was not limited to one innocent misfill of a prescription. *McClure*, 613 N.W.2d at 231. The pharmacist admitted the need for extra staff during the noon rush hour at the pharmacy when the plaintiff's prescription was filled and there was evidence of 34 incident reports of dispensing errors nearly identical to the dispensing error in the case before the court. *Id.* The court determined the jury could reasonably infer the defendant had a serious problem in this regard, knew it had the problem, but did not take adequate steps to correct it. *Id.* The court also found it egregious that Defendant failed to warn the plaintiff or her doctors of the serious adverse side effects associated with the drug and the abrupt discontinuance of the drug when it knew of the prescription error 12 days before plaintiff was injured and its failure to warn was contrary to its own standards and policy manual. *Id. see also Kiesau v. Bantz*, 686 N.W.2d 164, 173-74 (Iowa 2004) (county sheriff was liable for punitive damages when the record showed he failed to take action in disciplining his son-in-law who was also a deputy although the record clearly indicated he knew of numerous complaints regarding the deputy's conduct and failed to discipline the deputy).

In the case at bar, there is no evidence Mr. Kuperman or anyone at CAT Scale engaged in a persistent course of conduct with respect to how he handled workers' compensation claims to show that he acted with no care and with disregard to the consequences of those acts when he drafted Plaintiff's termination letter, including in the letter as a factor for the termination, Plaintiff's violation of company policy on modifying his medical care. There is no evidence that Mr. Kuperman regularly fails to research legal issues leading to adverse consequences to others. There is no evidence that Mr. Kuperman generally terminates employees who have work-related injuries.

Mr. Kuperman testified he was not aware that his letter was contrary to the law and there is no evidence that any of CAT Scale's management employees were aware of the change in law. Mr. Kuperman admitted he did not research the issue of whether or not an employee was entitled to seek unauthorized medical care. However, there was no reason for him to do the research because the evidence indicates that Plaintiff never reported to anyone that Plaintiff intended to abandon his statutory rights and pay for his own medical care. It was reasonable for Mr. Kuperman to rely upon the Human Resources Manager, Lori Thompson, in drafting the letter. Ms. Thompson testified she reviewed the statute regarding seeking alternative care and none of the factors were applicable to Plaintiff's situation. Consequently, she believed Plaintiff violated company policy by not communicating the

modification of his care. All CAT Scale representatives testified they would not have taken any adverse action against Plaintiff if they understood the action was contrary to the law.

The fact that CAT Scale was simply mistaken in its understanding of the law is insufficient to submit the issue of punitive damages to the jury. The Iowa Supreme Court has held a mistaken belief is insufficient to meet the exacting standard for punitive damages. *See Vlotho v. Hardin County*, 509 N.W.2d 350, 356 (Iowa 1993) (County did not carry its burden of proving former county engineer acted in wanton and willful disregard of the county's rights when he demolished a bridge because of a mistaken assumption, in violation of an agreement to preserve the bridge, and without obtaining permission from the county board); *Cedar Falls Bldg. Center, Inc. v. Vietor*, 365 N.W.2d 635 (Iowa Ct. App. 1985) (bank was not liable for punitive damages when its assistant vice president mistakenly told its customers that lien waivers had been filed so sub-contractors could not put liens on the property if they did not get paid); *Dessel v. Dessel*, 431 N.W.2d 359 (Iowa 1988) (attorney was not liable for punitive damages in a legal malpractice action after he mistakenly inserted a hold harmless clause in a partnership dissolution agreement).

The facts in this case stand in stark contrast to cases where the Supreme Court has found sufficient evidence for punitive damages based upon the conduct of an attorney. In *Wilson v. Vanden Berg*, 687 N.W.2d 575 (Iowa 2004), an attorney was liable for punitive damages in a small claims action because the attorney intentionally breached his contract with plaintiff's. *Id.* at 586. At the beginning of his representation of plaintiffs, defendant knew plaintiffs wished to resolve their real estate dispute quickly. *Id.* Plaintiffs wanted to pursue an action against the seller's realtor for misrepresenting the parcel size. *Id.* Defendant assured plaintiffs he had no conflict of interest, but defendant did have a conflict because he did not wish to take any action to harm his relationship with local realtors. *Id.* Punitive damages were appropriate because the attorney accepted plaintiffs as clients knowing he could or would not fully represent their interests. *Id.* at 587.

In *Miranda v. Said*, 836 N.W.2d 8, 34 (Iowa 2013) the court reversed a directed verdict on punitive damages finding that a reasonable jury could conclude that a lawyer acts with willful or wanton conduct by pursuing a course of action with knowledge that it is contrary to the plain language of the governing statute. The attorney was representing a family who entered the United States without documentation. *Id.* at 13. The attorney advised the family to return to Ecuador after receiving a removal order and have their children sponsor them for citizenship based on the extreme hardship of being separated. Despite the attorney's assurances that the plan was essentially foolproof, the children were not actually qualified to sponsor them, as only a parent or spouse may sponsor a citizenship request based on hardship. The attorney admitted he knew this when he advised them. However, he claimed he had been successful with the same plan numerous times in the past, but was unable to provide documentation supporting this, which the court determined could lead to a reasonable inference the attorney was lying. *Id.* Unlike the facts in *Miranda*, the Workers' Compensation Act on its face does not indicate an employee is entitled to abandon his statutory rights and pay for his own medical care. There is no admission in evidence that anyone at CAT Scale knew about the Iowa Supreme Court's 2010 interpretation of the Act in *Bell Bros.*

As these cases demonstrate in comparison to the facts in the case at bar, there is insufficient evidence for a jury to determine by a preponderance of clear, convincing, and satisfactory proof that CAT Scale discharged Plaintiff in willful and wanton disregard for his workers' compensation rights. Consequently, the court should direct a verdict in CAT Scale's favor on the issue of punitive damages.

Respectfully submitted,

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